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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1995

THE CADLE COMPANY, *Petitioner*,

v.

BANKSTON & LOBINGIER, a Partnership, et al., *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS SECOND COURT OF APPEALS DISTRICT OF TEXAS, AT FORT WORTH

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May 17, 1995

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QUESTION PRESENTED

Does the "deemed admission" provision in Texas Rule of Civil Procedure 169 meet the Constitutional requirement of due process under the 14th Amendment of the United States Constitution when the Rule mandates automatic sanctions against a party without prior notice or an opportunity for the party to be heard on the issues involved?

LIST OF PARTIES AND RULE 28.1 LIST

The parties to the proceedings below were the Petitioner, The Cadle Company and the Respondents, Bankston & Lobingier, a partnership; Betty C. Bankston, Individually and as Independent Executrix of the estate of John R. Bankston; the community estate of John R. Bankston and Betty C. Bankston; David C. Lobingier; and, the community estate of David B. Lobingier and Gay A. Lobingier.

Petitioner, The Cadle Company, has no parent company or subsidiaries.

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1995

THE CADLE COMPANY, *Petitioner*,

v.

BANKSTON & LOBINGIER, a Partnership; BETTY C. BANKSTON, Individually, and as Independent Executrix of the Estate of John R. Bankston; THE COMMUNITY ESTATE OF JOHN R. BANKSTON AND BETTY C. BANKSTON; DAVID B. LOBINGIER; and THE COMMUNITY ESTATE OF DAVID B. LOBINGIER AND GAY A. LOBINGIER, *Respondents*.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS, SECOND COURT APPEALS DISTRICT OF TEXAS AT FORT WORTH

Petitioner, The Cadle Company, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Court of Appeals, Second Court of Appeals District of Texas at Forth Worth, entered in the above-entitled proceeding on January 12, 1994.

OPINIONS BELOW

The opinion of the Court of Appeals, Second Court of Appeals District of Texas at Fort Worth is reported at 868 S.W.2d 918 and is reprinted in the appendix hereto, p. 1a, *infra*.

The judgment of the Court of Appeals, Second Court of Appeals District of Texas at Fort Worth is reprinted in the appendix hereto, p. 17a, *infra*.

The order of the Court of Appeals, Second Court of Appeals District of Texas at Fort Worth denying

Petitioner's Motion for Rehearing is reprinted in the appendix hereto, p. 18a, *infra*.

The *per curiam* opinion of the Texas Supreme Court denying Petitioner's Application for Writ of Error is reprinted in the appendix hereto, p. 20a, *infra*.

The order of the Texas Supreme Court overruling Petitioner's Motion for Rehearing is reprinted in the appendix hereto, p. 21a, *infra*.

JURISDICTION

The Court of Appeals, Second Court of Appeals District of Texas at Fort Worth, entered its judgment in this matter on January 12, 1994. The Texas Supreme Court denied Petitioner's Application for Writ of Error on December 8, 1994, and subsequently overruled Petitioner's Motion for Rehearing of the Application for Writ of Error on February 16, 1995.

The jurisdiction of this Court to review the judgment of the Court of Appeals, Second Court of Appeals District of Texas at Fort Worth, writ denied by the Texas Supreme Court, is invoked under 28 U.S.C. § 1257 (a).

STATUTE INVOLVED

Rule 169 of the Texas Rules of Civil Procedure is set out in full in the appendix hereto, p . 29a, *infra.* The pertinent provisions of Rule 169 provide as follows:

> The matter is admitted without necessity of a court order unless, within thirty days after service of the request, or within such time as the court may allow, or as otherwise agreed by the parties, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by his attorney. . . .
>
> * * *
>
> Any matter admitted under this rule is conclusively established as to the party

making the admission unless the court on motion permits withdrawal or amendment of the admission.

STATEMENT OF THE CASE

This suit arises out of a promissory note executed by the law firm of Bankston & Lobingier, a general partnership. Petitioner, the holder and owner of the promissory note, brought suit to recover sums due under the note. Respondent, David B. Lobingier (hereinafter referred to as Respondent), a general partner of Bankston & Lobingier, filed a counterclaim against Petitioner alleging that he had suffered damage to his credit reputation as a result of the breach of a collateral agreement between the parties.

During the discovery phase of the suit, Respondent filed a set of Request for Admissions with the trial court pursuant to Rule 169 of the Texas Rules

of Civil Procedure. Petitioner disputes Respondent's representation that a set of these Requests for Admissions were ever delivered to Petitioner, or were even known to exist by the Petitioner, until after Petitioner had filed its appeal to the Court of Appeals. No responses were filed to the Request for Admissions. By operation of Rule 169, without any prior notice or hearing, and "without necessity of court order," the many self-serving and issue- conclusive request for admissions were automatically deemed to be "admitted" by Petitioner, even though Petitioner had never received them and had no knowledge of their existence. Petitioner had no idea that there was a need to address the fact that it never received the Request for Admissions until after it was procedurally too late to seek judicial relief .

The case was later tried to the Court. At no time during the trial were the Request for Admissions ever raised or mentioned. Both sides presented evidence during trial. There is no evidence in the record that the trial judge relied upon the Request for Admissions or even knew of their existence. The judgment entered by the Trial Court and the Trial Court's findings did not conform to the deemed admissions. It was only in response to Petitioner's Brief in the Court of Appeals that Respondent raised for the first time in the lawsuit that there were "deemed admissions" in the record which would support the judgment entered by the Trial Court. This was the first time that Petitioner became aware that a set of Request for Admissions were in existence which had been purportedly served on Petitioner.

During trial, the Trial Court entered a directed verdict against Petitioner on its claim for approximately $12,000. Following trial, the trial court entered judgment against Petitioner for $300,000. The Court of Appeals affirmed the judgment. In its Opinion , the Court of Appeals relied almost exclusively on the Requests for Admissions which were automatically deemed admitted under Rule 169, and cited the various deemed admissions throughout its opinion as proof that the Petitioner was precluded from appellate relief. (*See* Court of Appeals' Opinion in the appendix hereto, p. 1a, *infra*).

REASONS FOR GRANTING THE WRIT

The "deemed admission" provision of Texas Rule of Civil Procedure 169 violates a citizen's right to due process under the 14th Amendment to the United States Constitution

> **because it allows for the taking of property without the necessity of notice or a judicial determination or court hearing.**

The original purpose for request for admissions was to simplify trials and eliminate matters about which there is no real controversy. However,

> Rule 169 was not promulgated as an unwary encumbrance or entrapment to defeat the presentation of the relevant, bona fide testimony and evidence in a full hearing concerning ultimate, controlling material fact issues. Rule 169 is not to be employed to defeat a search for the truth. Basically Rule 169 is an implement for fair disposition of factual matters that could be and would be agreed to.

Liberty Mutual Life Insurance Company v. Hayden, 779 S.W.2d 877, 879 (Tex. Civ. App.-Beaumont 1989), *rev'd on other grounds*, 786 S.W.2d 260 (Tex.1990). The purpose of Rule 169 is to avoid the

necessity of proving facts which are not controverted and which are peculiarly within the knowledge of, or readily ascertainable to, a party litigant of whom admissions are requested. *Texas General Indemnity Company v. Lee*, 570 S.W.2d 231, 233 (Tex. Civ. App.- Eastland 1978, writ ref'd n.r.e.).

Although Rule 169 was not designed to defeat a search for the truth, as seen in the case before this Court, there will always be a litigant who will find a way to twist a rule of law to an unfair and unintended advantage, and it is this potential for abuse that is allowed by Rule 169. The issues which Respondent sought to have admitted by Petitioner were not merely "matters that could be and would be agreed to," but were issues which went to the very heart of the controversy. (See Requests for Admissions in the

appendix hereto, p. 22a, *infra*.) More often than not, request for admissions are now being drafted so that if, by chance, they are automatically deemed admitted by rule of law, the result will be devastating on the party to whom Rule 169 sanctions. The sanctions and effect of the "deemed admissions" come into full force and effect immediately, without prior notice or hearing and without the safeguard of judicial review.

In practical effect, the "deemed admissions" rule is just as issue-determinative as a summary judgment or default judgment. Although Petitioner does not dispute the ability of a state to utilize *sua sponte* rules of civil procedure, self-activating sanctions must include the opportunity for notice and a predetermination hearing before the court. Petitioner disputes Respondents' allegation that Respondent

complied with the requirement of Rule 169 that the request for admissions be served on the opposing party. However, Rule 169 has no notice or hearing requirement before sanctions are automatically assessed if the request for admissions are not answered within thirty days. If the Rule required a hearing before automatically deeming the various statements to be binding as "true", then a party would have an opportunity to be heard before the trial court prior to sanctions being imposed. The trial court may have to make a factual determination of whether notice was properly given as required by Rule 169. However, the Rule does not provide for such determination and thus a hearing is never held. The Rule dispenses with the requirement of a hearing and invokes its sanctions immediately without prior opportunity for a hearing or

the necessity of determination by the court. This lack of notice and hearing is not cured by a later trial since there is no requirement under Texas law that request for admissions be offered into evidence or even raised during trial. *See Insurance Company of North America v. Fire Insurance Exchange*, 508 S.W.2d 703, 704 (Tex. Civ. App. -- Waco 1974, no writ). A party is also precluded under Texas law from raising on appeal issues which were not raised in the trial court. Thus, the lack of a requirement of notice and a hearing in Rule 169 prior to requests being deemed admitted effectively deprives a party of his day in court and his property without due process.

The Fourteenth Amendment provides that no state shall deprive any person of life, liberty, or property without due process of law. U. S. Const.

Amend XIV. The fundamental requisite of due process of law is the opportunity to be heard. *Goldberg v. Kelly*, 397 U.S. 254, 268, (1970). Due process under the Fourteenth Amendment requires that state governments provide minimal procedural safeguards, including some form of notice and a hearing, before taking actions that deprive an individual of property. *Okeson v. Tolley School District No. 25,* 760 F.2d 864, 868 (8th Cir. 1985). A fundamental purpose of the due process clause is to allow the aggrieved party the opportunity to present his case and have its merits fairly judged. *Id.*

No better description of the essence of due process can found than the description given by Justice Frankfurter:

> The requirement of notice and an

> opportunity to be heard raises no impenetrable barrier to the taking of a person's possessions. But the fair process of decision making that it guarantees works, by itself, to protect against arbitrary deprivation of property. For when a person has an opportunity to speak up in his own defense, and when the State must listen to what he has to say, substantively unfair and simply mistaken deprivations of property interests can be prevented. It has long been recognized that 'fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights. . . . [And n]o better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it.'

Fuentes v. Shevin, 407 U.S. 67, 81, (quoting *Joint Anti-Fascist Refugee Committee v. McGrath,* 341 U.S. 123, 170-172, (1951)(Frankfurter, J., concurring).

Procedural due process imposes constraints on governmental decisions which deprive individuals of property interests within the meaning of the Due

Process Clause of the Fifth or Fourteenth Amendment. *Mathews v. Eldridge*, 424 U.S. 319, 333, (1976). To prevail upon a procedural due process claim, a party must establish: (1) a constitutionally protected interest in life, liberty or property; (2) governmental deprivation of that interest; and (3) the constitutional inadequacy of procedures accompanying the deprivation. *See Lehr v. Robertson*, 463 U.S. 248, 256 (1983). A general rule of due process review is that sanctions which interfere with a litigant's claim or defenses violate his due process rights if they are imposed merely for punishment of an infraction that did not threaten to interfere with the rightful decision of the case, so that delay alone, without focus on the effects of the delay, would not justify dismissal or default. *Wanderer v. Johnson*, 910 F.2d 652 (9th Cir.

1990).

There is no dispute that Petitioner has a constitutionally protected interest or that the judgment entered against it deprives it of its property. The only issue to be resolved is the constitutional inadequacy of the procedure accompanying the deprivation. The automatic sanction provision of Rule 169 fails to provide the basic requirements of due process of notice and opportunity to be heard. If responses are not timely filed, a litigant has case determinative facts conclusively established against him or her. Rule 169 does not require that notice be given or that a hearing be held prior to the time that requests are conclusively deemed admitted. No court order is required. The sanction is automatic and many times, as in this case, fatal. Request for admissions which are lost in the mail

or intentionally or unintentionally not served on an opposing party are sufficient to deprive a litigant of his day in court and his property. A litigant's failure (and in the case before this Court, the non-culpable failure) to file responses to request for admissions within 30 days of receiving them does not "threaten to interfere with the rightful decision of the case." No additional burden is placed on Texas trial courts by requiring notice and a hearing before case dispositive sanctions are imposed.

The "deemed admission" provision in Rule 169 is found in many of this Nation's state court rules of civil procedure, and is also found in Rule 36 of the Federal Rules of Civil Procedure. However, "[t]he fact that a practice is followed by a large number of states is not conclusive in a decision as to whether that

practice accords with due process, . . ." *Schall v. Martin*, 467 U.S. 253, 269 (1984). A rule of civil procedure that initially had as its goal the simplification of issues has now evolved into an issue-preclusion rule which requires adequate procedural safeguards. The "deemed admission" rule does not require a hearing and opportunity to be heard prior to case-determinative request for admissions being automatically admitted. The lack of this vital element fails to meet the due process requirements of the 14th Amendment. Litigants should be given the right to speak in their own defense, and the State shoud be required to listen to what they have to say, to prevent substantively unfair and simply mistaken deprivations of property interests.

CONCLUSION

For the reasons stated above, this petition for certiorari should be granted. The "deemed admission" provision found in the Texas Rule of Civil Procedure 169 violates the due process rights afforded United States citizens. This case should be remanded to the Texas state court for a hearing on the notice issue involved herein.

Respectfully submitted,

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May 17, 1995

APPENDIX

NO. 2-93-054-CV

COURT OF APPEALS

SECOND COURT OF APPEALS DISTRICT OF TEXAS

FORT WORTH

THE CADLE COMPANY — APPELLANT

VS.

BANKSTON & LOBINGIER, A PARTNERSHIP, BETTY C. BANKSTON, INDIVIDUALLY, AND AS INDEPENDENT EXECUTRIX OF THE ESTATE OF JOHN R. BANKSTON, THE COMMUNITY ESTATE OF JOHN R. BANKSTON AND BETTY C. BANKSTON, DAVID B. LOBINGIER AND THE COMMUNITY ESTATE OF DAVID B. LOBINGIER AND GAY A. LOBINGIER — APPELLEES

FROM THE 48TH DISTRICT COURT OF TARRANT COUNTY

OPINION

The Cadle Company appeals from a take-nothing

judgment in its suit against Bankston & Lobingier, a partnership, et al., (B & L), to recover on a promissory note and a judgment for David B. Lobingier on his counterclaim for breach of contract. On appeal, Cadle complains the trial court erred in directing the verdict against it and in admitting exhibits concerning Lobingier's inability to obtain credit, and the evidence does not support the findings of fact. Cadle further contends deemed admissions do not support the judgment because contradictory evidence was admitted without objection and no instructed verdict was entered for Bankston.

We overrule all points of error and affirm the judgment because: Cadle did not introduce evidence that contradicted the deemed findings; Bankston was included in the judgment without objection; Lobingier established a valid defense to Cadle's claim; Cadle and Bankston's widow established no partnership existed when the note was executed; and the uncontroverted deemed admissions render the remaining points untenable.

Through a series of assignments, Cadle became the owner of a $48,000 promissory note that Lobingier executed in favor of Park Central Bank, N.A. After notifying B & L it had acquired the note, Cadle demanded full payment. B & L did not pay and Cadle filed the instant suit.

In a separate suit, Cadle sought to recover payment from Lobingier on a note he executed individually. A partial summary judgment was entered against Lobingier and he was ordered to pay the note. Lobingier now counterclaims Cadle promised, and failed, to reverse his adverse credit history when he paid the note. Cadle maintains it notified the credit bureau the note had been paid and this was all it was obligated to do.

At the close of Cadle's evidence, Lobingier moved for a directed verdict and the trial court granted it, finding Cadle failed to prove the note was an obligation of the partnership of B & L and its balance. The trial court also entered judgment for Lobingier on his counterclaim finding a contract existed, Cadle breached that contract, and Lobingier sustained damages

therefrom in the amount of $300,000.

In its first point of error, Cadle claims the trial court erred in directing the verdict against it because it did not have the burden of proving the balance due on the note since B & L did not plead and prove payment. To the contrary, we find B & L adequately pled and proved it fulfilled its obligation to Cadle and Cadle did not rebut the proof.

A court of appeals must affirm the trial court's ruling on a motion for directed verdict if the appellant fails to present some legally sufficient evidence of each element of the cause of action it raised below. See, e.g., Cecil v. Zivley, 683 S.W.2d 853 (Tex.App.--Houston [14th Dist.] 1984, no writ). To recover on a promissory note, the plaintiff must prove the note was executed by the defendant, the plaintiff is the present holder of the note, and the note has been introduced into evidence. TEX. BUS. & COM. CODE ANN. 3.307(b) (Tex. UCC) (Vernon 1968); Federal Sav. and Loan Ins. Corp. v. Atkinson-Smith University Park Joint Venture, 729 F.Supp.1130 (N.D. Tex. 1989).

In the instant case, the note was admitted into evidence and Lobingier did not deny he executed it. When the signatures are admitted or established, production of the instrument entitles a holder to recover on it **unless** the defendant establishes a defense. Strickland v. Coleman, 824 S.W.2d 188, 192 (Tex.App.--Houston [1st Dist.] 1991, no writ)(emphasis added).

In his amended answer, Lobingier asserted a defense equivalent to payment. Specifically, he claimed he was entitled to a set-off against the indebtedness as alleged and he tendered full payment. Lobingier sought to establish these defenses in his first request for admissions by asking Cadle to admit or deny the genuineness of the following facts:

> Admit or deny that Defendant Lobingier made a tender of all amounts due and owing to the FDIC, as a result of any indebtedness by Defendant to Park Central Bank N.A.
>
> Admit or deny that the tender to the FDIC by defendant was made on August 30, 1990 and November 11, 1990.
>
> Admit or deny that the tender to the FDIC by defendant was as to all sums due and owing on any indebtedness to Park Central Bank, N.A.

> Admit or deny that Plaintiff is not a holder in due course of the note made the basis of Plaintiff's Original Petition.
>
> Admit or deny that Defendant Lobingier is entitled to credits and offsets to any indebtedness purportedly due as a result of the rendering legal services to Park Central Bank, N.A.
>
> Admit [or deny] that the amount of credits and offsets Defendant Lobingier is entitled to is the sum of $ 12[,]753.33 plus interest thereon at the rate of 6% per annum from August 22, 1989.

Cadle failed to answer this request; therefore, the facts therein were automatically deemed admitted unless the court, on motion, permitted their withdrawal or amendment, see TEX. R. CIV. P. 169 and Marshall v. Vise, 767 S.W.2d 699 (Tex. 1989), or the party relying on the admissions failed to object when contradictory evidence was introduced. See id. at 700. Cadle claims one of its officers, Jeff Joseph, contradicted Lobingier's tender and set-off defenses. After reviewing the record, we find Joseph's testimony did no such thing. Joseph testified Lobingier did not tender payment or provide legal services to Cadle, but he did not testify Lobingier did not tender payment to the FDIC or provide services to Park Central Bank, N.A. Therefore, no

evidence contrary to the deemed admissions was admitted. Because the trial court did not permit Cadle to withdraw or amend the requests and the admissions therein were not waived, they were deemed admitted.

Consequently, Cadle admitted it was not a holder in due course so it was a payee who held the note subject to all defenses available in an action on a simple contract. TEX. BUS. & COM. CODE ANN. § 3.306(2), (3) (Tex. UCC) (Vernon 1968); Strickland, 824 S.W.2d at 192. Set-off and tender are defenses to liability on a simple contract.

Although Cadle alleged an indebtedness of $ 12,171.24, plus interest, attorney's fees, and court costs, it is deemed to have admitted the balance on the debt was offset by attorney's fees of $12,753.33, leaving no principal balance due. As for the interest, attorney's fees, and court costs, Cadle is deemed to have admitted B & L tendered full payment and this relieved Lobingier of liability for subsequent interests, costs, and attorney's fees. See id. Because Lobingier introduced evidence

on a valid defense, to prevail Cadle had to produce contradictory testimony, which it did not do. Point of error one is overruled.

In its second point of error, Cadle complains it established the note was an obligation of the partnership and the trial court's finding to the contrary is against the great weight and preponderance of the evidence.

Findings of fact entered in a case tried to the court are of the same force and dignity as a jury's verdict upon special issues. City of Clute v. City of Lake Jackson, 559 S.W.2d 391, 395 (Tex.Civ.App.--Houston [14th Dist.] 1977, writ ref'd n.r.e.). In reviewing a point of error asserting that a finding is "against the great weight and preponderance" of the evidence, we must consider and weigh all of the evidence, both the evidence which tends to prove the existence of a vital fact as well as evidence which tends to disprove its existence. See Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986)(per curiam); Ford Motor Co. v. Nowak, 638 S.W.2d 582, 585 (Tex.App.--Corpus Christi 1982, writ ref'd n.r.e.).

The death of a partner dissolves the partnership. TEX. REV. CIV. STAT. ANN. art. 6132b, 31(4) (Vernon 1970); Texaco,Inc. v. Wolfe, 601 S.W.2d 737 (Tex.Civ. App.--Houston [1st Dist.] 1980, writ ref'd n.r.e.). Cadle's pleading established no partnership existed when the note was executed. Specifically, Cadle acknowledged John R. Bankston, a partner in B & L, died on January 9, 1988, and the promissory note was executed on August 18, 1988, seven and one-half months after Bankston's death. In addition, the record contains a *verified denial* executed by Betty C. Bankston, individually and as executrix, which demonstrates no partnership existed on August 18, 1988.[1] Further, Cadle produced no evidence Lobingier bound the partnership after it dissolved under TEX. REV. Clv. STAT. ANN. art. 6132b, 35(1)(b)(1) (Vernon 1970) . Point of error two is overruled. Cadle's third, fifth, sixth, seventh, and eighth points of error challenge the legal and factual sufficiency of the

---

[1] Betty C. Bankston denied "she or John R. Bankston executed, had knowledge of the execution of, or authorized the execution of the Note. . . ."

evidence to support the trial court's findings on Lobingier's counterclaim.

The trial court's findings of fact are reviewable for legal and factual sufficiency of the evidence to support them, First Nat'l Bank in Dallas v. Kinabrew, 589 S.W.2d 137, 146 (Tex.Civ.App.--Tyler 1979, writ ref'd n.r.e.), by the standards applied in reviewing the legal or factual sufficiency of the evidence supporting a jury's answer to a special issue. Okon v. Levy, 612 S.W.2d 938, 941 (Tex.Civ.App.--Dallas 1981, writ ref'd n.r.e.). In reviewing a no evidence point, we consider only the evidence and inferences that support the finding, Jacobs v. Danny Darby Real Estate, 750 S.W.2d 174, 175 (Tex. 1988), and we view all the evidence in the record when considering the sufficiency of the evidence. Plas-Tex, Inc. v. U.S. Steel Corp., 772 S.W.2d 442, 445 (Tex. 1989). After we review the relevant evidence, we set aside the verdict only if the evidence standing alone is too weak to support the findings or if they are so against the overwhelming weight of the evidence that they are

manifestly unjust and clearly wrong. Pool v. Ford Motor Co., 715 S.W.2d 629, 634 (Tex. 1986) (opinion on reh'g).

Cadle's third point concerns the sufficiency of the evidence to support the trial court's finding it and Lobingier entered into an agreement whereby Cadle, for valuable consideration, was to withdraw all adverse credit reports it had filed with any reporting agency.

The evidence supporting the trial court's finding is Cadle's deemed admission and Lobingier's testimony. Cadle claims evidence to the contrary is a letter from Lobingier to Cadle's counsel which references an agreement to report the note "paid" rather than "withdraw" any adverse credit rating. Although this establishes a discrepancy, it does not establish a conflict in the evidence. Instead, we find the letter evidenced the underlying agreement and the deemed admission established proof of a contemporaneous oral agreement expanding Cadle's responsibility. On balance, the evidence is sufficient to support the trial court's finding. Point of error three is overruled.

In its fifth and sixth points of error, Cadle challenges the findings that it breached its agreement with Lobingier and failed to withdraw an adverse credit rating it filed against him with TRW, a credit reporting agency.

The evidence supporting these findings includes Lobingier's testimony and the deemed admissions:

> [Cadle] failed to withdraw an adverse credit report on Defendant Lobingier filed with TRW even though Defendant Lobingier has satisfied and fulfilled the agreement with [Cadle].
>
> [Cadle] has breached its agreement with Defendant Lobingier in Cause No. 342-132789-91, said agreement being to withdraw any and all adverse credit reports filed by [Cadle] with any credit reporting agency.

Although Cadle's account officer, Jeff Joseph, testified he made no agreement with Lobingier, this does not contradict the deemed admissions because Lobingier testified he made the agreement with Cadle through its attorney and agent, Mark Winnubst, not Joseph. After reviewing this evidence, we find it sufficient to support the findings. Points of error five and six are overruled.

In points of error seven and eight, Cadle claims the findings Lobingier suffered damages and injuries as a proximate result of it having breached the agreement, and Lobingier suffered damages therefrom in the amount of $300,000, are not supported by the evidence.

A party may recover damages for loss of credit or injury to credit reputation in a breach of contract action where the evidence sufficiently shows the loss is the natural, probable, and foreseeable result of the defendant's breach. Mead v. Johnson Group, Inc., 615 S.W.2d 685 (Tex. 1981). Here, the evidence includes Lobingier's testimony he was denied credit because Cadle did not withdraw the adverse credit rating and he has suffered severe mental anguish therefrom. In particular, the Veteran's Land Board denied him a loan causing him to procure less favorable terms from another lender. Also, Home Depot denied him credit and Landmark Bank refused to renew his loan. Further, Lobingier testified, without objection, this situation took a great deal of his time away from his practice and he suffered

damage in mental anguish. Finally, there is a deemed admission:

> [T]hat as a proximate result of the breach of the agreement with Defendant Lobingier by [Cadle], that Defendant has suffered damages and injuries in the form of damage to his credit and credit reputation.

This admission was not waived by the admission of controverting evidence; therefore, this evidence is sufficient to show Lobingier suffered adverse consequences and injury from Cadle's actions entitling him to damages. See American Bank v. Waco Airmotive, 818 S.W.2d 163 (Tex.App.--Waco 1991, writ denied).

The damages award is discretionary with the fact finder. Id. In light of the above evidence, the fact that Cadle did not object to testimony concerning mental anguish damages and did not challenge the propriety of mental anguish damages in a breach of contract action, and the following uncontroverted admission, we hold the evidence sufficient to support the court's findings.

> [T]he damages suffered by Defendant Lobingier to his credit and credit reputation are in the sum of

$500,000.00.

Points of error seven and eight are overruled.

In point of error four, Cadle complains the trial court erred in admitting defendants' exhibits 3, 4, 5, and 6, which concern Lobingier's ability to obtain credit, because they were hearsay.

To obtain reversal of a judgment based upon error of the trial court in admission or exclusion of evidence, the following must be shown: (1) the trial court did in fact commit error, and (2) the error was reasonably calculated to cause and probably did cause the rendition of an improper judgment. Gee v. Liberty Mut. Fire Ins Co., 765 S.W.2d 394, 396 (Tex. 1989). Regardless of whether the trial court erred in admitting the exhibits, their admittance did not affect the judgment because the same facts were established by Lobingier's testimony and the following deemed admissions:

Admit or deny that Plaintiff has failed to withdraw an adverse credit report on Defendant Lobingier filed with TRW even though Defendant Lobingier has satisfied and fulfilled the

agreement with Plaintiff.

Admit or deny that as a proximate result of the breach of the agreement with Defendant Lobingier by Plaintiff, that Defendant has suffered damages and injuries in the form of damage to his credit and credit reputation.

These admissions were not controverted. Point of error four is overruled.

The judgment is affirmed.

DAVID F. FARRIS
JUSTICE

PANEL A
FARRIS, WEAVER, AND HICKS, JJ.
PUBLISH
JAN 12 1994

NO. 2-93-054-CV

COURT OFAPPEALS

SECOND COURT OF APPEALS DISTRICT OF TEXAS

FORT WORTH

The Cadle Company	§	From the 48th District Court
	§	
vs.	§	of Tarrant County
	§	(48-9324- 91)
	§	
	§	January 12, 1994
	§	
Bankson & Lobingier, et. al	§	Opinion by Justice Farris

JUDGMENT

This Court has considered the record on appeal in this case and is of the opinion that there was no error in the judgment of the trial court. It is ordered, adjudged and decreed that the trial court's judgment is affirmed.

It is further ordered that appellant, The Cadle Company, and its surety, Western Surety Company, pay all costs of this appeal, for which let execution issue, and that this decision be certified below for observance.

David F. Farris

COURT OF APPEALS

SECOND COURT OF APPEALS DISTRICT OF TEXAS

FORT WORTH

The Cadle Company

vs.

Bankston & Lobingier, A Partnership, Betty C. Bankston, Individually, and as Independent Executrix of the Estate of John R. Bankston, The Community Estate of John R. Bankston and Betty C. Bankston, David B. Lobingier and the Community Estate of David B. Lobingier and Gay A. Lobingier

No. 2-93-054-CV

ORDER

On this day came on to be considered the motion of appellant, The Cadle Company, for rehearing and appellees' response.

It is the opinion of this Court that the motion for rehearing should be and is hereby **overruled.** It is the order of this Court that the opinion and judgment of January 12, 1994, stand unchanged.

The Clerk of this Court is directed to transmit a copy of this Order to the attorneys of record.

It is so ordered.

SIGNED THIS 15th day of February, 1994.

DAVID F. FARRIS
JUSTICE

IN THE SUPREME COURT OF TEXAS

No. 94-0291

THE CADLE COMPANY, PETITIONERS

v.

BANKSTON & LOBINGIER, A PARTNERSHIP, BETTY C. BANKSTON,
INDIVIDUALLY, AND AS INDEPENDENT EXECUTRIX OF THE ESTATE OF
JOHN R. BANKSTON, THE COMMUNITY ESTATE OF JOHN R. BANKSTON AND
BETTY C. BANKSTON, DAVID B. LOBINGIER, AND THE COMMUNITY ESTATE OF DAVID B. LOBINGIER AND
GAY A. LOBINGIER, RESPONDENTS

ON APPLICATION FOR WRIT OF ERROR TO THE COURT OF APPEALS FOR THE SECOND DISTRICT OF TEXAS

PER CURIAM

Petitioner's application for writ of error is denied. The Court neither approves nor disapproves of the court of appeals' discussion of mental anguish damages. 868 S.W.2d 918, 924.

Opinion Delivered: December 8, 1994

THE SUPREME COURT OF TEXAS
P. O. Box 12248
Supreme Court Building
Austin, Texas 78711
John T. Adams, Clerk

February 16, 1995

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Henry Meier Jones & Travis
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Mr. David L. Evans
Hooper Evans & Kobs
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306 West 7th Street
Fort Worth, TX 76102-4991

RE: Case Number 94-0291
Style: THE CADLE COMPANY
v.
BANKSTON & LOBINGIER, A PARTNERSHIP ET AL.

Dear Counsel:

Today, the Supreme Court of Texas overruled petitioner's motion for rehearing, as corrected, of the application for writ of error in the above styled case.

Sincerely,

John T. Adams, Clerk
by _____
Blanca E. Morin, Deputy

NO. 48-139324-91

THE CADLE COMPANY	§	IN THE DISTRICT COURT
	§	
VS.	§	
	§	
BANKSTON & LOBINGIER, a Partnership, BETTY C. BANKSTON, Individually and as Independent Executrix of the Estate of John R. Bankston, THE COMMUNITY ESTATE OF JOHN R. BANKSTONAND BETTY C. BANKSTON DAVID B. LOBINGIER, AND THE COMMUNITY ESTATE OF DAVID B. LOBINGIER AND GAY A. LOBINGIER	§	TARRANT COUNTY, TEXAS
	§	48TH JUDICIAL DISTRICT

DEFENDANT DAVID B. LOBINGIER'S
FIRST REQUEST FOR ADMISSIONS TO PLAINTIFF

TO: THE CADLE COMPANY, Plaintiff in the above entitled and numbered cause, by and through its attorneys of record, Maryann Sarris Brousseau, Mark D. Winnubst, James W. Rose, Jr., 1111 Campbell Centre II, 8150 North Central Expressway, Dallas, Texas 75206-1863.

Pursuant to the provisions of Rule 169, Texas Rules of Civil Procedure, Plaintiff, THE CADLE COMPANY, is hereby requested

to admit the truth of the facts stated below, within thirty-one (31) days after delivery of this request. You are advised that, as provided in Rule 169, each of the matters stated below, of which admission is requested, will be deemed admitted unless a sworn statement is delivered to Defendant herein, the party requesting said admissions, within thirty-one (31) days after delivery of this Request or within such further time as the Court may allow on motion and notice, either denying specifically the matters of which admission is requested herein, or setting forth in detail the reasons why said matters cannot truthfully be either admitted or denied.

1. Admit or deny that Defendant Lobingier made a tender of all amounts due and owing to the FDIC, as a result of any indebtedness by Defendant to Park Central Bank N.A..

REPLY:

2. Admit or deny that the tender to the FDIC by defendant was made on August 30, 1990 and November 11, 1990.

REPLY:

3. Admit or deny that the tender to the FDIC by defendant was as to all sums due and owing on any indebtedness to Park Central Bank, N.A.

REPLY:

4. Admit or deny that Plaintiff has made repeated calls to Defendant Lobingier to collect the debt mentioned in Plaintiff's Original Petition.

REPLY:

5. Admit or deny that Plaintiff has made the calls referred to in the preceding request in a harassing and unreasonable manner as a part of a campaign of harassment and intimidation to collect the disputed debt.

REPLY:

6. Admit or deny that as a proximate cause of the harassing telephone calls to Defendant Lobingier, Defendant has suffered injuries and damages.

REPLY:

7. Admit or deny that the damages suffered by Defendant

Lobingier are in the sum of $100,000.00.

REPLY:

8. Admit or deny that Plaintiff has breached its agreement with Defendant Lobingier in Cause No. 342-132789-91, said agreement being to withdraw any and all adverse credit reports filed by Plaintiff with any credit reporting agency.

REPLY:

9. Admit or deny that Plaintiff has failed to withdraw an adverse credit report on Defendant Lobingier filed with TRW even though Defendant Lobingier has satisfied and fulfilled the agreement with Plaintiff.

REPLY:

10. Admit or deny that as a proximate result of the breach of the agreement with Defendant Lobingier by Plaintiff, that Defendant has suffered damages and injuries in the form of damage to his credit and credit reputation.

REPLY:

11. Admit or deny that the damages suffered by Defendant

Lobingier to his credit and credit reputation are in the sum of $500,000.00.

REPLY:

12. Admit or deny that Plaintiff is not a holder in due course of the note made the basis of Plaintiff's Original Petition.

REPLY:

13. Admit or deny that Defendant Lobingier is entitled to credits and offsets to any indebtedness purportedly due as a result of the rendering legal services to Park Central Bank, N.A.

REPLY:

14. Admit that the amount of credits and offsets Defendant Lobingier is entitled to is the sum of $12753.33 plus interest thereon at the rate of 6% per annum from August 22, 1989.

REPLY:

15. Admit or deny that Plaintiff by and through its authorized representatives has threatened to accuse Defendant Lobingier of fraud and illegal activities.

REPLY:

16. Admit or deny that Plaintiff has represented to others that Defendant Lobingier is willfully refusing to pay a nondisputed debt when the debt is in dispute and in spite of the fact that Defendant Lobingier has notified Plaintiff of the dispute, in writing.

REPLY:

17 Admit or deny that Plaintiff has threatened Defendant Lobingier with the filing of a complaint in violation of the Texas Debt Collection Practices Act.

REPLY:

18. Admit or deny that at all times material, Defendant Lobingier was a consumer of credit.

REPLY:

Respectfully submitted,

DAVID B. LOBINGIER
Attorney at Law
A Professional Corporation
1300 First City Bank Tower
201 Main Street
Fort Worth, Texas 76102
(817) 332-5800

By _____
David B. Lobingier

CERTIFICATE OF SERVICE

I certify that I have served a copy of the foregoing Defendant David B. Lobingier's First Request for Admissions to Plaintiff on all parties, or their attorneys of record, in compliance with Rule 21 and Rule 21a of the Texas Rules of Civil Procedure, on the 16th day of March, 1992 by certified mail, return receipt requested.

s/ (David B. Lobingier)

RULE 169. REQUESTS FOR ADMISSIONS

1. Request for Admission. At any time after commencement of the action, a party may serve upon any other party a written request for the admission, for purposes of the pending action only, of the truth of any matters within the scope of Rule 166b set forth in the request that relate to statements or opinions of fact or of the application of law to fact, including the genuineness of any documents described in the request. Copies of the documents shall be served with the request unless they have been or are otherwise furnished or made available for inspection and copying. Whenever a party is represented by an attorney of record, service of a request for admissions shall be made on his attorney unless service on the party himself is ordered by the court. A true copy of a request for admission or of a written answer or objection, together with proof of the service thereof as provided in Rule 21a, shall be filed promptly in the clerk's office by the party making it.

Each matter of which an admission is requested shall be separately set forth. **The matter is admitted without necessity of a court order** unless, within thirty days after service of the request, or within such time as the court may allow, or as otherwise agreed by the parties, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by his attorney, but, unless the court shortens the time, a defendant shall not be required to serve answers or objections before the expiration of fifty days after service of the citation and petition upon that defendant. If objection is made, the reason therefor shall be stated. The answer shall specifically deny the matter or set forth in detail the reasons that the answering party cannot truthfully admit or deny the matter. A denial shall fairly meet the substance of the requested admission, and when good faith requires that a party qualify his answer or deny only a part of the matter of which an admission is requested, he shall specify so much of it as is true and qualify or deny the remainder. An answering party may not give lack of information or knowledge as a reason for

failure to admit or deny unless he states that he has made reasonable inquiry and that the information known or easily obtainable by him is insufficient to enable him to admit or deny. A party who considers that a matter of which an admission is requested presents a genuine issue for the trial may not, on that ground alone, object to the request; he may, subject to the provisions of paragraph 3 of Rule 215, deny the matter or set forth reasons why he cannot admit or deny it.

2. Effect of Admission. **Any matter admitted under this rule is conclusively established as to the party making the admission unless the court on motion permits withdrawal or amendment of the admission**. Subject to the provisions of Rule 166 governing amendment of a pre-trial order, and Rule 166b-6 governing duty to supplement discovery responses, the court may permit withdrawal or amendment of responses deemed admissions upon a showing of good cause for such withdrawal or amendment if the court finds that the parties relying upon the responses and deemed admissions will not be unduly prejudiced and that the presentation of the merits of the action will be subserved thereby. Any admission made by a party under this rule is for the purpose of the pending action only and neither constitutes and admission by him for any other purpose nor may be used against him in any other proceeding. (*Emphasis added*).

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FILED
JUN 19 1995
CLERK

(2)

No. 94-1894

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

THE CADLE COMPANY,

Petitioner,

v.

BANKSTON & LOBINGIER, a Partnership, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO
THE COURT OF APPEALS
SECOND COURT OF APPEALS DISTRICT OF TEXAS,
AT FORT WORTH

BRIEF IN OPPOSITION BY RESPONDENTS DAVID B. LOBINGIER AND THE COMMUNITY ESTATE OF DAVID B. LOBINGIER AND GAY A. LOBINGIER

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(817) 335-9377 (Telephone)
(817) 332-6962 (Facsimile)
Counsel for Respondents.

June 19, 1995

Washington, D.C. • THIEL PRESS • (202) 328-3280

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14pp

QUESTION PRESENTED

Does the "deemed admission" provision in Tex. R. Civ. P. 169 meet the constitutional requirement of due process under the Fourteenth Amendment of the United States Constitution when the rule mandates automatic sanctions against a party without prior notice or an opportunity for the party to be heard on the issues involved?

LIST OF PARTIES

Petitioner:	The Cadle Company
Respondents:	Bankston & Lobingier, a Partnership
	David B. Lobingier and the community estate of David B. Lobingier and Gay A. Lobingier

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No. 94-1894

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

THE CADLE COMPANY,

Petitioner,

v.

BANKSTON & LOBINGIER, a Partnership, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO
THE COURT OF APPEALS
SECOND COURT OF APPEALS DISTRICT OF TEXAS,
AT FORT WORTH

BRIEF IN OPPOSITION BY RESPONDENTS DAVID B. LOBINGIER AND THE COMMUNITY ESTATE OF DAVID B. LOBINGIER AND GAY A. LOBINGIER

TO THE HONORABLE SUPREME COURT;

The Respondents, David B. Lobingier and the Community estate of David B. Lobingier and Gay A. Lobingier, respectfully request that this Court deny the Petition for Writ of Certiorari submitted by Petitioner, The Cadle Company.

OPINIONS BELOW

The opinion of the Second Court of Appeals District of Texas at Fort Worth sought to be reviewed by Petitioner is correctly set forth in Petitioner's appendix A. Petitioner correctly describes and attaches the opinions and procedural history of the case.

STATEMENT OF JURISDICTION

The Petitioner seeks to invoke the jurisdiction of this court pursuant to 28 U.S.C. §1257(a). Respondents deny that jurisdiction is proper because Petitioner failed to attack the constitutionality of Tex. R. Civ. P. 169 at the trial court level or before the Court of Appeals by point of error. Petitioner raised the constitutional issue for the first time in its motion for rehearing. The Court of Appeals denied the motion for rehearing without opinion, and without reviewing the constitutional argument. The Texas Supreme Court refused to grant writ of error or review the constitutional arguments made by Petitioner.

In *Bailey v. Anderson*, 326 U.S. 203 (1945), this Court declined to review the constitutionality of a Virginia condemnation statute which was attacked for the first time by assignment of error to the Virginia Supreme Court. Mr. Chief Justice Stone wrote: ". . . throughout the proceedings in the circuit court appellate made no claim to interest on constitutional grounds, and made no attack on the constitutionality of the award to the court's decree because of the asserted denial of interest." 326 U.S. at 206. "Appellant for the first time, assailed on constitutional grounds the asserted denial of interest by his assignments of error in the state Supreme Court of Appeals. . . . On this record we cannot say that . . . the Supreme Court of Appeals of Virginia, by denying writ

of error, passed upon any question of the constitutionality of such denial of interest, not raised on the record or passed upon below. Unless this affirmatively appears on the record brought here for review on appeal, this court is without jurisdiction of this appeal." 326 U.S. at 207.

STATEMENT OF THE CASE

Respondent David Lobingier obtained a judgment against Petitioner for $300,000 following a bench trial. The judgment reflected actual damages awarded to Mr. Lobingier as a result of the Petitioner's breach of an agreement with Respondent.

The Petitioner concedes that during the discovery phase of such suit, the Respondent filed a set of requests for admissions with the trial court pursuant to Tex. R. Civ. P. 169 (Petition, page 5 and 6). Petitioner further concedes that no responses were filed to the requests for admissions (Petition, page 6).

The Requests for Admissions at issue were served on March 16, 1992. (Petition p. 28a).

The statement of facts reflects that the trial before the court commenced on October 6th, 1992. Therefore, 204 days elapsed from the time that the requests for admissions were filed among the papers of the case until the commencement of the trial. During this entire period of time, Petitioner and its counsel could have ascertained, by a simple inspection of the file, that such requests had been filed. The transcript further indicates that Respondents filed a Second Request for Admissions on September 3, 1992, slightly more than thirty-three days before trial, and served the same counsel for Petitioner. Thus, the Petitioner's attorneys were advised well before the trial by the title of such pleadings as the Second Request

for Admissions that in all probability a First Request for Admissions existed. In fact the Second Request for Admissions was discussed at trial. (SOF 101-105).

Finally, during the trial, the court was requested to take judicial notice of the contents of its entire file and the court did so without objections from the Petitioner. (SOF 105).

ARGUMENT AND AUTHORITIES

Tex. R. Civ. P. 169 is patterned after Fed. R. Civ. P. 36. The Rule provides, in language identical to Rule 36, that requests which are unresponded to are deemed admitted. The pertinent provision states:

> The matter is admitted without necessity of a court order unless, within thirty days after service of the request, or within such time as the court may allow, or as otherwise agreed by the parties, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter. . . .

Tex. R. Civ. P. 169(1).

This Court has long recognized that a state may regulate the procedure of its courts in accordance with its own concept of policy and fairness, unless it offends a fundamental principle of justice or unless the procedure is unreasonable or arbitrary. *Patterson v. New York*, 432 U.S. 197 (1977).

Petitioner argues that due process is denied because the rule mandates automatic sanctions against a party (1) without prior notice or (2) an opportunity to be heard on the issue involved. Respondent argues below that the Texas Rules of Civil Procedure are not unreasonable or arbitrary and that due process is not denied because

notice and an opportunity to be heard are provided by the Rules.

In determining whether the provisions of Rule 169 constitute an impermissible denial of due process, the procedures outlined in the rule should be construed in context with the overall procedural system utilized by Texas courts. The system is codified in the Texas Rules of Civil Procedure.

As discussed previously, Rule 169 incorporates several components to forward notice and opportunity to be heard to litigants. Each is discussed below.

Rule 169 provides that: "at any time after commencement of the action, a party may serve upon any other party a written request. . . ." Thus, the availability of requests for admissions are limited to periods after the commencement of the action and thus after the original notice to a party that a proceeding has been instituted against it. This section of the Rule further provides that such party must be served with a written request. Accordingly, an oral request for an admission is unauthorized by the rule. Service of the request is governed by Tex. R. Civ. P. 21(a) which governs method of service in Texas and provides that "every . . . request" may be served by delivering a copy to the party to be served, or the party's duly authorized agent or attorney of record either in person or by certified or registered mail.

According to Texas procedure, the certificate of service is prima facie proof of service. Tex. R. Civ. P. 21(a) provides in pertinent part:

> The party or attorney of record shall certify to the court compliance with this rule in writing over signature and on the filed instrument. A certificate by a party or an attorney of record, or the return

> of the officer, or the affidavit of any other person showing service of a notice shall be prima facie evidence of the fact of service.

Rule 169 further provides that "a true copy of a request for admission . . . shall be filed promptly in the clerk's office by the party making it." Tex. R. Civ. P. 23 and 25 require the clerk of the court to maintain a docket which "shall show in convenient form . . . all subsequent proceedings had in the case with the dates thereof" and further to "mark on each paper in every case the file number of the cause." The purpose of this procedure is to make and keep an official record of the documents filed in the cause and to collect those documents by file number such that they may be inspected by the parties to the cause or their attorneys. Tex. R. Civ. P. 76 provides that "each attorney at law practicing in any court shall be allowed at all reasonable times to inspect the papers and records relating to any suit or other matter in which he may be interested."

At trial, Respondent requested the trial court to take judicial notice of the contents of its file. *See* Tex. R. Civ. Evid. 201. Error in a case may not be predicated upon a ruling which admits evidence unless a substantial right of the parties affected and there is a timely objection or motion to strike the admitted evidence. Tex. R. Civ. Evid. 103. In order for a party to preserve a complaint for appellate review, a party must have presented to the trial court a timely objection stating the specific grounds for the ruling he desires the court to make. Further, the party must obtain a ruling upon the objection. Tex. R. App. P. 52. No judgment is reversed in Texas unless the error complained of amounts to such a denial of rights of the appellant as was reasonably calculated to cause and probably did cause rendition of an improper

judgment in the case. Tex. R. App. P. 83, 184; *Gee v. Liberty Mut. Fire Insurance Co.*, 765 S.W.2d 394, 396 (Tex. 1989).

It is apparent that no error was preserved at the trial court level or at the court of appeals with regard to the consideration of the request for admissions. The court of appeals' opinion does not rest upon the deemed admissions alone. The opinion states that it is based on testimony and deemed admissions. (See p. 15(a) of Petition for Writ of Certiorari). A review of the Statement of Facts discloses that there was testimony presented to the trier of fact with regard to the failure to withdraw the adverse credit report and damages suffered by the Defendant. Thus, under the Rules of Appellate Procedure and the case law of the State of Texas, the consideration of the deemed admissions could not be reversible error since there was other testamentary evidence available to support the judgment.

Tex. R. Civ. P. 169 allows the trial court to permit the withdrawal of deemed admissions:

> upon a showing of good cause for such withdrawal or amendment if the court finds that the parties relying upon the responses and deemed admissions will not be unduly prejudiced and that the presentation of the merits of the action will be subserved thereby.

Texas appellate courts routinely examine the failure to respond to requests for admission and the procedure set forth in Rule 169 for the withdrawal of the deemed admissions. In *Cudd v. Hydrostatic Transmissions, Inc.*, 867 S.W.2d 101, 105 (Tex. Ct. App.—Corpus Christi 1993, *no writ*), the court held that withdrawal of deemed admissions should be permitted when responses were filed less than one week late. In *Employers Insurance of*

Wausau v. Halton, 792 S.W.2d 462, 466 (Tex. Ct. App.–Dallas 1990, *no writ*) the court held that when an attorney prepared handwritten responses which were inadvertently placed in the file rather than being typed and mailed, withdrawal was proper. In *North River Insurance Company v. Greene*, 824 S.W.2d 697 (Tex. Ct. App.–El Paso 1992, *writ denied*), an attorney's mistake in calendaring a response date was found to be sufficient cause to permit withdrawal.

Conversely, in *Trevino v. Central Freight Lines*, 613 S.W.2d 356, 360 (Tex. Ct. App.–Waco 1981, *no writ*) and *Texas Employer's Ins. Ass'n v. Bragg*, 670 S.W.2d 712, 715 (Tex. Ct. App.–Corpus Christi 1984, *writ ref'd n.r.e.*), the appellate court in each case upheld a trial court's refusal to permit withdrawal or amendment. In *Trevino*, the requests for admissions were ignored for a period of eleven months and the motion to withdraw deemed admission was not filed until the day of trial.

In *Bragg*, the responses were three months late and again, the motion to withdraw deemed admissions was not filed until the day of trial.

In short, the Texas Rules of Civil Procedure afford adequate provisions for the notification of parties that Requests for Admissions have been filed and an adequate opportunity for a party failing to respond to such requests to be heard and to obtain relief. Petitioner failed to avail itself of these opportunities by failing to respond timely, failing to inspect the clerk's file docket or the clerk's file, failing to object at trial to the court's judicial notice of the file containing the Requests for Admission, and failure to request, at any stage of the proceedings, the withdrawal of the deemed admissions. The existence of other testimony to support the judgment bolsters the fact that consideration of the admissions could not be harmful.

CONCLUSION

Respondents respectfully pray that the petition for *writ of certiorari* be in all things denied for the reasons set forth above.

Respectfully submitted,

DAVID L. EVANS
State Bar No. 06713080
(Counsel of Record)

JEFFREY H. KOBS
State Bar No. 11642500

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Counsel for Respondents.